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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1357

JULIUS WILKERSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner, Julius Wilkerson, prays that a writ of certiorari be issued to review the judgment of the United States Court of

Appeals for the Fifth Circuit which affirmed petitioner's judgment of conviction and sentence for violation of 21 USC 846, rendered by the United States District Court for the Eastern District of Louisiana.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit was rendered on February 19, 1974, and is not yet reported. It is appended hereto as Appendix "A". (A companion case, involving the same search and seizure, but with only petitioner's co-defendant, Clarence Hill, as defendant therein, is reported at 500 F2d 315; a copy of this opinion is appended hereto as Appendix "C".) Wilkerson's petition for rehearing was denied without opinion by the Court of Appeals on April

1, 1975, and notice of this denial is appended hereto as Appendix "B". The judgment of conviction and sentence in the District Court was rendered on April 17, 1974, and is not reported. (R.p.613)

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 USC 1254, to review by writ of certiorari the judgment rendered in the Court of Appeals for the Fifth Circuit on February 19, 1974, and entered that same date, and as to which judgment petitioner herein filed a petition for rehearing and for rehearing en banc on March 3, 1975, which petition was denied on April 1, 1975.

The jurisdiction of the Court of Appeals for the Fifth Circuit was invoked under 28 USC 1291, to review by appeal

the final decision of the Honorable Jack M. Gordon, Judge, Section "I" of the U.S. District Court, Eastern District of Louisiana, rendered on April 17, 1974.

The jurisdiction of the District Court was invoked by the Government of the United States, through its Grand Jury, by return into said court of an indictment charging petitioner and two co-defendants with violation of 21 USC 846, by conspiring to distribute, and to possess with intent to distribute, heroin.

QUESTIONS PRESENTED

At the trial on the merits in the Eastern District of Louisiana, the Government introduced in evidence against all three defendants a large quantity of heroin and packaging materials seized from co-defendant Clarence

Hill's automobile. The defendants sought to suppress from evidence this heroin and packaging materials, arguing, inter alia, that the seizure of these items was the fruit of impermissible government activity, i.e., that the officers obtained the information concerning the items and the "probable cause" to search the vehicle via the reprehensible tactic of questioning Hill's seven-year-old son out of the presence of his parents, "swearing him in" as a "junior federal agent", and paying him the sum of $3.75 for his assistance. The District Court denied the motion to suppress, and admitted the items in evidence at the trial on the merits. Petitioner and his co-defendants, upon conviction, appealed to the Court of Appeals for the Fifth

Circuit, which affirmed the trial judge's decision. The first question thus presented to this Court is:

I. IS IT PERMISSIBLE IN THESE UNITED STATES OF AMERICA FOR GOVERNMENT POLICE AGENTS TO EMPLOY A SUSPECT'S SEVEN-YEAR-OLD CHILD AS AN INFORMANT OR SPY AGAINST SAID SUSPECT TO REPORT ON ACTIVITY INSIDE THE HOME?

a) DOES THE ABSENCE OF AN EXPRESS, EXPLICIT PROHIBITION FORBIDDING THE EMPLOYMENT OR USE OF CHILD-INFORMANTS AGAINST THEIR PARENTS RENDER SUCH A PRACTICE PROPER AND PERMISSIBLE IN THIS COUNTRY?

b) WHAT DETERRENT, OTHER THAN EXCLUSION OF EVIDENCE OBTAINED THEREBY, DO THE PEOPLE OF THE UNITED STATES OF AMERICA HAVE AGAINST EMPLOYMENT BY GOVERNMENT POLICE AGENTS OF THE SAID PEOPLE'S CHILDREN AGAINST THEM AS SPIES/INFORMANTS ON ACTIVITIES AND CONDUCT INSIDE THE HOME?

The second question presented to this Court for determination arises from the trial court's denial of defendants' motion for mistrial based on four remarks made by the prosecutor in the course of

his closing argument. First, the prosecutor opened his argument with a bit of congratulatory flattery to the jury: "I have noticed you as you have watched attentively, listen to the witnesses, observed the witnesses' demeanor, observed the defendants' demeanor and everything that went on in the courtroom..." Subsequently, in the course of his argument, the prosecutor argued that petitioner's motive in transmitting a money order to his co-defendant must be presumed to be the criminal conspiracy charged, due to the non-testifying defendants' failure to introduce evidence of any other reason: "...I submit to you that even an act as innocent as the sending of a money order is an overt act in furtherance of the conspiracy, because there is only one logical

conclusion that you can draw from the evidence that's been presented, that the only reason that the money order was sent, you have heard no other reason for the money order to be sent, was that it was to purchase heroin with... There is no other evidence presented, other than the association between these individuals was for anything, but to distribute heroin." The prosecutor thereafter concluded: "...Thus, ladies and gentlemen, through that evidence that you have heard from the witness stand, upon your oath to truly consider the evidence presented, the Government submits that you must return upon the only evidence presented, that there was a conspiracy between Clarence Hill, Julius Wilkerson, Clarence Diggs and Joyce Picard, Cora Virgil, Barbara Smith,

the other conspirators named and upon the evidence presented that you will return the only true and just verdict, that of guilty as charged." Defendants' motion for mistrial argued that these remarks constituted improper comment on the failure of defendants to testify. The question presented to this Court is:

II. MAY THE PROSECUTION, IN CLOSING ARGUMENT, COMMENT IN THREE DIFFERENT WAYS ON THE FAILURE OF A NON-TESTIFYING DEFENDANT TO OFFER EVIDENCE OF AN INNOCENT MOTIVE OR PURPOSE FOR HIS ACT OF SENDING A MONEY ORDER TO CONTROVERT THE GOVERNMENT'S ARGUED INFERENCE THAT THE PURPOSE WAS TO PURCHASE HEROIN --- WHERE THE ONLY WITNESSES WHO COULD COMPETENTLY TESTIFY TO THE TRUE PURPOSE OF THE TRANSACTION WERE THE PARTIES THERETO, i.e., PETITIONER, WHO PURCHASED AND SENT THE MONEY ORDER, AND HIS CO-DEFENDANT, WHO RECEIVED THE MONEY ORDER (AND WHOM PETITIONER COULD NOT COMPEL TO TESTIFY)---AND, IN THE SAME ARGUMENT, MAY PROSECUTION CONGRATULATE THE JURORS FOR THEIR ATTENTIVENESS IN "LISTEN(ING) TO THE WITNESSES, OBSERV(ING) THE

WITNESSES' DEMEANOR, OBSERV(ING) THE DEFENDANTS' DEMEANOR", WITHOUT PREJUDICING THE NON-TESTIFYING DEFENDANTS' RIGHT TO FAIR TRIAL AND DUE PROCESS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS OF THE U. S. CONSTITUTION?

a) DO THIS COURT'S DECISIONS IN FONTAINE v. CALIFORNIA (1968) 390 US 593 AND IN GRIFFIN v. CALIFORNIA (1965) 380 US 609 DEMONSTRATE A NE PLUS ULTRA, i.e., DEMONSTRATE A CASE WHERE THE PROSECUTION IN ARGUMENT JUST BARELY EXCEEDED THE FURTHEST LIMITS OF PERMISSIBILITY IN COMMENT UPON FAILURE OF THE DEFENDANT'S DEFENSE IN SILENCE, OR DOES THE PROPER STANDARD OF DUE PROCESS REQUIRE A GREAT DEAL MORE CIRCUMSPECTION FROM THE PROSECUTION IN COMMENTING ON THE DEFENDANT'S DEFENSE'S SILENCE?

CONSTITUTIONAL PROVISIONS, ETC. INVOLVED

The pertinent provisions of the First, Third, Fourth, Fifth, Sixth and Ninth Amendments of the U.S. Constitution are set forth in Appendix "D", infra.

STATEMENT OF THE CASE

Petitioner Julius Wilkerson and his

two co-defendants, Clarence Hill and Clarence Diggs, were convicted of violating 21 USC 846 by conspiring to distribute, and to possess with intent to distribute, heroin. Numerous errors were urged on appeal to the Court of Appeals, of which only two issues are presented to this Court in this petition for certiorari: 1) admission in evidence against all three defendants of forty "bundles" of heroin and packaging materials seized from the trunk of Clarence Hill's automobile, the whereabouts of said vehicle and the nature of the trunk's contents having been discovered by the federal agents through exploitation of Hill's seven-year-old son as a "junior federal agent" to inform on his father's activities at home; 2) impermissible comment by the prosecutor

in closing argument on the failure of petitioner or his co-defendants (none of whom testified) to prove that the transfer of funds between them via money order was for any other purpose than to purchase heroin.

The factual circumstances which present these two issues are as follows:

A.

The "Junior Federal Agent"

On July 1, 1972, a search party of federal Drug Enforcement Administration agents and New Orleans Police Department narcotics officers executed a federal search warrant at the home of petitioner's co-defendant, Clarence Hill. The search of Hill's home produced two "bundles" of heroin, $17,991 in cash and other items. Suspecting Hill to be in possession at that time of a much larger quantity of heroin than the two

"bundles" retrieved from his home, the agents and officers conducted an extensive search of the curtilage of the home, e.g., the backyard, etc. While one group of agents/police had Hill and his wife secured in the front portion of the house, NOPD Sgt. Soule and, subsequently, DEA Special Agent John Phillips, the search team leader, conversed with Hill's seven-year-old son, John Kennedy Hill, in the rear portion of the house and the backyard. As Agent Phillips testified at the suppression hearing in the trial court:

> ...He was a little buddy. I'm not sure, Your Honor, but it would have to be corroborated by the other officers, but I think we got together we might have told the child about becoming a special Federal agent and being sworn in. We have done that in the past a lot of times, have them raise their right hand and put our folder out and swear them in, like they're honorary federal agents. I recall, Your Honor, that he knew

who we were and I might have done that to this child. I know at the end we took his picture.

...

THE COURT:

And I take it then that since you say you had done this in the past, you would consider this normal investigative procedure?

THE WITNESS:

Oh, yes.

THE COURT:

Do you ever ask a child how old he is before you do this?

THE WITNESS:

Probably, Your Honor, because it's breaking the ice. We ask him how old he is, what grade he is in in school and that's one of the best things to make a child start talking to you.

(Supplemental Appendix, S/R pp.111-112)

The officers and Agent Phillips questioned John Kennedy Hill about his father's activities in and about the house, what he did with "peanut bags" (used in packaging heroin dosage units), where his father kept various materials and items, and eventually had the child lead them around the block to where his father parked his car. The officers

then searched the vehicle and discovered the heroin, "peanut bags", Scotch tape and rubber bands, all of which were introduced in evidence against all defendants, including petitioner, at the trial on the merits. The agents, after seizing these items, collected a total of $3.75 among themselves and jestfully presented this sum to the young Hill as a reward for information leading to the contraband seizure. (S/R. pp. 85-140)

B.

Improper Argument

Briefly capitulated, the evidence presented to the jury showed: On October 24, 1971, petitioner sent a telegraphic money order for $1,350 to Hill at Diggs' home address in New York City. In the last week of February, 1972, unindicted co-conspirators Barbara Smith

and Joyce Picard made a round-trip to New York City from New Orleans during which Barbara Smith picked up at Diggs' New York home a package of heroin and transported it back to New Orleans. Upon her return to New Orleans, she exchanged the package with Hill for $300, the agreed upon wages for the trip. The next day Hill, Wilkerson, Diggs, Picard and another unindicted co-conspirator, Cora Virgil, returned to Barbara Smith's home with the heroin, and various packaging materials, and spent several hours repacking 40 bundles of heroin into 2,000 little glassine envelopes. The rest of the heroin was left hidden in the Smith home. A week later, Hill and Wilkerson returned and again repacked another 40 bundles into 2,000 glassine envelopes in the Smith home. The

following week, the remaining 20 bundles were repacked by Hill and Wilkerson. When they left the Smith home on this occasion, they also took the surplus wrapping materials. About 3 months later, in the search and seizure involving Hill's home and automobile on July 1, 1972, another 42 bundles of heroin were turned over to police by Hill and other members of his family, along with $17,991 in cash and a gun.

The prosecutor opened his closing argument with these congratulatory remarks:

> ...I want to thank you...for your attentiveness that you have shown over the last three days. You have done your duty as a jury. I have noticed you as you have watched attentively, listen to the witnesses, observed the witnesses' demeanor, observed the defendants' demeanor and everything that went on in the courtroom...

(R.pp.474-475)

Later in the course of his argument, the prosecutor expounded:

> What evidence has the Government put on to show how these three defendants conspired, confederated and agreed together and among themselves and with the named co-conspirators and other co-conspirators not named to distribute heroin? In chronological sequence we would have the Western Union application and money order, Government Exhibit 5-A, the money order application. You heard testimony from Kenneth Dixon who is a qualified expert in the field of handwriting analysis. Mr. Dixon testified that upon receiving known samples of defendant, Wilkerson's, handwriting these samples brought into court by Mr. Brignac marked for purposes of identification as Government Exhibit 11 and 12, a blow-up taken from this original application, testified that he compared the handwriting from the reports. You saw how he put them up. You saw how he compared. His testimony being there was no doubt in his mind that the same individual who filled out those reports was the same individual who filled out this money order application. Now, where was that money order application sent? It was sent from New Orleans to New York where this check was made out which was cashed in the normal course of business. This check which Mr. Larsen testified he had received no complaint

> in his file that it was cashed by any other than the person to whom it was intended to be cashed by. Who was it intended to be cashed by? It was Julius Wilkerson that wrote Clarence Hill at what address? 1595 McComb's Road. Whose address in Bronx, New York, is 1595 McComb's Road? The proof at trial shows that 1595 McComb's Road was the residence of the defendant, Clarence Diggs in New York. I submit to you that even an act as innocent as the sending of a money order is an overt act in furtherance of the conspiracy, because there is only one logical conclusion that you can draw from the evidence that's been presented, that the only reason that the money order was sent, you have heard no other reason for the money order to be sent, was that it was to purchase heroin with, heroin from the streets of New York City to be distributed here in the Eastern District of Louisiana, here on the streets of New Orleans. There is no other evidence presented, other than the association between these three individuals was for anything, but to distribute heroin...

(R.pp.476-478)

Later, in conclusion, the prosecutor remarked:

> Thus, ladies and gentlemen through

> that evidence that you heard from the witness stand, upon your oath to truly consider the evidence presented, the Government submits that you must return upon the only evidence presented, that there was a conspiracy between Clarence Hill, Julius Wilkerson, Clarence Diggs, and Joyce Banks Picard, Cora Virgil, Barbara Smith, the other conspirators named and upon the evidence presented that you will return the only true and just verdict, that of guilty as charged. Thank you.

(R.p.485)

All three defendants moved for mistrial for the reason that the prosecutor's comments with reference to 1) observing the demeanor of the witnesses and the demeanor of the defendants, and 2) "you have heard no other evidence presented as to why the money order was sent", each called to the jury's attention the fact that the defendants did not testify, as did the closing remark about "the only evidence that's been presented to you." (R.pp.485-486)

This motion was denied by the court. (R.pp.486-487)

Both of the above described decisions of the trial court were urged as error, among others, in petitioner's appeal to the Court of Appeals for the Fifth Circuit, which affirmed the conviction on February 19, 1975 (Appendix "A"); petitioner's petition for rehearing was denied on April 1, 1975. (Appendix "B")

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by this Honorable Court for two reasons: 1) the Court of Appeals, in finding no merit in petitioner's objection to the Government's conduct in recruiting children as informants against their parents, has decided an important question of federal law which has not been,

but should be, decided by this Court; and 2) the decision of the Court of Appeals for the Fifth Circuit in this case, in finding no prejudicial error in the prosecutor's closing argument, conflicts with that of the Court of Appeals for the First Circuit in Desmond v. US (1st Cir 1965) 345 F2d 225 and in US v. Flannery (1st Cir 1971) 451 F2d 880, in that the "true" purpose or motive of Wilkerson in transmitting the money order could only have been competently testified to by Wilkerson himself or his co-defendant Hill, the payee of the money order, the prosecutor's comments therefore necessarily constituting comment on the defendants' failure to testify.

For these reasons, this Honorable Court should grant review herein.

I.

IS IT PERMISSIBLE IN THESE UNITED STATES OF AMERICA FOR GOVERNMENT POLICE AGENTS TO EMPLOY A SUSPECT'S SEVEN-YEAR-OLD CHILD AS AN INFORMANT OR SPY AGAINST SAID SUSPECT TO REPORT ON ACTIVITY INSIDE THE HOME?

As described in the Statement of the Case, supra, and more fully in the record of the suppression hearing (S/R.pp. 85-140), the agents and officers exploited the admiration which Hill's son had for them as lawmen and, via a mock "swearing in" ceremony, led the boy to believe he had been made a "junior agent", ultimately obtaining information from the boy about his father's practices in the home and the location of his vehicle as well as the fact that if the white powder they were looking for was not in the home, it would be in the automobile. Finally, the agents had the boy lead them around the block to

where Hill's car was parked, which the agents then searched, discovering the sought-for heroin and packaging materials. Following this seizure, the agents and officers jestfully bantered among themselves about the manner in which they had obtained the information about the car and its contents. As described by DEA Agent Phillips in his testimony at the suppression hearing:

> A. Freddie Soule, the detective who I have worked with for ten years, was kidding me about the information that we developed and he said, "This is your cooperating individual. Why don't you, who has all the money, give him some of it for an informant fee." I remarked that I would do that and I got a dollar and it was in a jest, in a kidding way and I gave it to John Kennedy Hill, the defendant's son a dollar and so did some of the other policemen. I think there was a total of $3.75 given to him and he was happy as could be.

(R.p.97)

The agents and officers felt no shame or embarassment nor expressed any apology for their action with the child--- such as justifying it on the basis of the exigency of the situation. Instead, Agent Phillips told the court:

> ...We have done that in the past a lot of times, have them raise their right hand and put our folder out and swear them in, like they're honorary federal agents...

(R.p. 111) And Sgt. Soule testified that in his twelve-year career with the New Orleans Police Department narcotics squad:

> ...This isn't the first occasion this has happened. It happened numerous times.

(R.p.136)

This, however, is apparently the first reported case which has brought to the attention of the higher courts in our land this prevalent federal and

local police practice of exploiting the admiration of naive young children for police officers and employing/using these youngsters as "special agents" (complete with mock induction ceremony) whose "duties" involve providing the government agents with information on the youngsters' parents' activities in and about the home.

Petitioner can argue the philosophical and ethical objections to such governmental conduct no better than the trial judge stated them in his ex tempore remarks at the close of the suppression hearing:

> ...we have the question of the use of the child---of the defendant's child and as the officers have candidly admitted, he was used as a surrogate agent...on the surface to someone in the judicial position looking at this purely philosophically, it seems to smack of big brotherism. I realize that the Government will take the attitude that

> narcotics traffic is a great evil and it's not easy to suppress and therefore, the Government must use tools available to it, including eliciting the aid of children of suspected offenders, in order for the overall good.
>
> On the other hand...the thought occurs to the Court, insofar as my own conscience is concerned, that I'm not sure in Communist Cuba that the agents of Castro justify in their own minds what I understand to be the interrogation of children in schools and whatnot as to the possible offenses of the state by their parents and that in their own minds, the justification is as great as that which we have stated. So there is the philosophical question of whether something is wrong in utilizing a child in this fashion. In this connection, of course, we can't test it solely by virtue from a legal standpoint of whether it smacks of big brotherism, as the Court stated, but, rather that there must be something legally wrong with it. Does it violate a constitutional right of the defendant or does it violate some procedure of law protected by statute or rule? Straightaway, I can't think of any.
>
> ...
>
> On a superficial analysis, I haven't been able to find any, so that's a side issue about which we might have a very long philosophical dissertation...You know, this is

one circumstance in which it seems to be relatively innocuous. Perhaps the circumstances control, but suppose that the police officers, feeling that this was a good avenue for investigation which apparently it must be decided that it would be well to approach a youngster playing around on street corners, swear them in as junior deputies or otherwise make them feel that they were performing some important function for the State, in order to enlist their assistance in getting evidence against their parents and neighbors and others, I think everyone would agree that there is certainly a point at which this procedure would assume such obnoxious proportion that none of us would want to do it or have it done by our Government, but, then we get back to the question, which is, what is the legal effect of it..

(R.pp.142-144)

(a)

DOES THE ABSENCE OF AN EXPRESS, EXPLICIT PROHIBITION FORBIDDING THE EMPLOYMENT OR USE OF CHILD-INFORMANTS AGAINST THEIR PARENTS RENDER SUCH A PRACTICE PROPER AND PERMISSIBLE IN THIS COUNTRY?

Apparently, no statute or rule exists in this Country which specifically prohibits the cultivation and/or employment

of children as informants against their parents. It is conceivable that our lawmakers have felt such legislation to be unnecessary, that such procedures are so repugnant to our national ideals and values as to render them intolerable even absent specific legislative prohibition.

However, it is perhaps true that certain constitutional rights of Clarence Hill were breached by the Government in its agents' conduct with his son.

The First, Third, Fourth and Fifth Amendments of the U.S. Constitution contain specific guarantees against Governmental invasions of various facets of one's "privacy".

The Ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to

deny or disparage others retained by the people."

In Boyd v. US (1886) 116 US 616, this Court recognized an individual's "privacy" as constitutionally protected. In Warden v. Hayden (1967) 387 US 294, this Court remarked, "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than of property, and have increasingly discarded fictional and procedural barriers rested on property concepts." And the Court that same year observed, "The Fourth Amendment protects people, not places." Katz v. US (1967) 389 US 347. The Tenth Circuit Court of Appeals described the Fourth Amendment thus: "The Fourth Amendment has never been characterized as a rule of evidence, but rather a charter for freedom from the invasion

of the right of privacy." Sumrall v. US (10 Cir 1967) 382 F2d 651, cert. denied 389 US 1055.

And in Griswold v. Connecticut (1965) 381 US 479, this Court recognized a constitutional right of "privacy" grounded in the combined influence of the First, Third, Fourth, Fifth and Ninth Amendments.

Petitioner respectfully submits that this Court's rationale employed in Griswold to defend the marital relationship from governmental intrusion applies with equal force to government intrusion, interference with and perversion of the bond of familial loyalty and trust between father and child.

Mr. Justice Goldberg, concurring in Griswold, characterized the Ninth Amendment as a demonstration of "the intent

of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments..."

This Court in Rochin v. California (1952) 342 US 165 regarded the requirements of the Due Process Clause as a mandate to review and judge "the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses..." and defined "due process of law" as:

> ...a summarized constitutional guarantee of respect for those personal immunities which...are "so rooted in the traditions and conscience of

> our people as to be ranked as fundamental"...or are "implicit in the concept of ordered liberty."...

342 US at 169.

Petitioner Wilkerson submits that, under either a Griswold-privacy or a Rochin-Due Process rationale, the practice employed by the Government in this case presents too much jeopardy to our national ideals for it to receive juridical sanction in any circumstances, and for this reason, this Honorable Court should review the decision of the Court of Appeals in this case.

(b)

WHAT DETERRENT, OTHER THAN EXCLUSION OF EVIDENCE OBTAINED THEREBY, DO THE PEOPLE OF THE UNITED STATES OF AMERICA HAVE AGAINST EMPLOYMENT BY GOVERNMENT POLICE AGENTS OF THE SAID PEOPLE'S CHILDREN AGAINST THEM AS SPIES/INFORMANTS ON ACTIVITIES AND CONDUCT INSIDE THE HOME?

As this Court observed in Elkins v.

US (1960) 364 US 206, 217, quoted in US v. Calandra (1974) 414 US 338, the purpose of the exclusionary rule "is to deter---to compel respect for the constitutional guaranty in the only effectively available way---by removing the incentive to disregard it."

In view of the fact that this is apparently the first case to present to this Court this issue of child-informant use by the Government, despite the testimony of the officers to the effect that this has been a common practice for at least the last twelve years, this Court should take this opportunity to review this practice and exercise its judgment upon the constitutional permissibility/propriety of this practice, lest another twelve years pass before the next opportunity presents itself to

this Court to stem the practice.

II.

MAY THE PROSECUTION, IN CLOSING ARGUMENT, COMMENT IN THREE DIFFERENT WAYS ON THE FAILURE OF A NON-TESTIFYING DEFENDANT TO OFFER EVIDENCE OF AN INNOCENT MOTIVE OR PURPOSE FOR HIS ACT OF SENDING A MONEY ORDER TO CONTROVERT THE GOVERNMENT'S ARGUED INFERENCE THAT THE PURPOSE WAS TO PURCHASE HEROIN---WHERE THE ONLY WITNESSES WHO COULD COMPETENTLY TESTIFY TO THE TRUE PURPOSE OF THE TRANSACTION WERE THE PARTIES THERETO, i.e., PETITIONER, WHO PURCHASED AND SENT THE MONEY ORDER, AND HIS CO-DEFENDANT, WHO RECEIVED THE MONEY ORDER (AND WHOM PETITIONER COULD NOT COMPEL TO TESTIFY)---AND, IN THE SAME ARGUMENT, MAY PROSECUTION CONGRATULATE THE JURORS FOR THEIR ATTENTIVENESS IN "LISTEN(ING) TO THE WITNESSES, OBSERV(ING) THE WITNESSES' DEMEANOR, OBSERV(ING) THE DEFENDANTS' DEMEANOR," ALL WITHOUT PREJUDICING THE NON-TESTIFYING DEFENDANTS' RIGHT TO FAIR TRIAL AND DUE PROCESS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS OF THE U.S. CONSTITUTION?

In Desmond v. US (1st Cir 1965) 345 F2d 225, the Court of Appeals for the First Circuit, faced with a most similar situation, held:

...No one but appellant (or his co-

> defendant, whom appellant could not put on the stand against his will) could have contradicted the government witness...Unless it is apparent on the record that there was someone other than himself whom the defendant could have called, the comment of necessity pointed to the only person who could have offered the contradiction, the defendant himself. Hence, in the present case, it was clearly improper...The government made the argument because it thought it would be effective. We can think of no effect other than to invite the jury's attention to the fact that the defendants had not taken the stand.

345 F2d at 227.

The same situation obtains in the instant case. The record is barren of any evidence which indicates that any non-defendant could have competently testified to the motive or purpose that moved petitioner to send the money order to his co-defendant. Given this background, the decision of the Fifth Circuit Court of Appeals in this case to the effect that the prosecutor's remarks

"could only have been understood as comments on the failure of the defense (as opposed to defendants) to counter or explain the testimony of the unindicted co-conspirators, the various police officials, and the prosecution's other witnesses and exhibits..." is in direct conflict with the First Circuit Court's decision in Desmond, and reiterated in US v. Flannery (1st Cir 1971) 451 F2d 880.

(a)

DO THIS COURT'S DECISIONS IN FONTAINE v. CALIFORNIA (1968) 390 US 593 AND IN GRIFFIN v. CALIFORNIA (1965) 380 US 609 DEMONSTRATE A NE PLUS ULTRA, i.e., DEMONSTRATE A CASE WHERE THE PROSECUTION IN ARGUMENT JUST BARELY EXCEEDED THE FURTHEST LIMITS OF PERMISSIBILITY IN COMMENT UPON FAILURE OF THE DEFENDANT'S DEFENSE'S SILENCE, OR DOES THE PROPER STANDARD OF DUE PROCESS REQUIRE A GREAT DEAL MORE CIRCUMSPECTION FROM THE PROSECUTION IN COMMENTING ON THE DEFENDANT'S DEFENSE'S SILENCE?

In refusing to find prejudicial error

in this case, the Court of Appeals below said:

> ...We disapprove of any comments by prosecutor or judge that even indirectly invites the jury's attention to the failure of the defendants to take the stand, but on the facts of this case we cannot say that the trial judge abused his discretion in not noticing that any improper comments were made. None of the statements are comparable to the prejudicial remarks and instructions that resulted in reversal of trial convictions in Fontaine v. California, 390 US 593...(1968), and in Griffin v. California, 380 US 609...(1965).

(Appendix "A", infra, pp. 43-48.)

It will be remembered that this Court's decisions in Fontaine and Griffin involved repeated prosecutorial comment on a non-testifying defendant's failure to take the stand in persistent reliance on a California procedural statute permitting such comment, notwithstanding the federal constitutional consideration to the contrary. The

above quoted language of the court below seems to indicate that that court will not find prejudicial error in any prosecutorial comment on defendant's silence short of the egregious violations committed in Fontaine and Griffin. Such a rationale is so far out of line with that of the Court of Appeals for the First Circuit in Desmond and Flannery as to merit review of the decision in this case, in order to settle and resolve the conflict between the First and Fifth Circuits on this constitutional issue.

III.

The questions presented by this case are of great and recurring significance in the administration of criminal justice in the federal courts, as well as in the courts of the various states,

due to the constitutional basis of the controversy. The conflict between the decisions of the First Circuit Court of Appeals and of the Fifth Circuit Court of Appeals in the instant case make this case peculiarly appropriat. for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WHEREFORE, your petitioner, Julius Wilkerson, prays that a Writ of Certiorari issue to the U.S. Court of Appeals for the Fifth Circuit, commanding said Court to certify and sent to this Court, on a day to be designated, a full and complete transcript of the record and

all proceedings of said Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals be reversed; and that the petitioner may be granted such other and further relief as to this Court may seem proper.

MICHAEL F. BARRY
Counsel for Petitioner
Julius Wilkerson
905 Maison Blanche Bldg.
New Orleans, La. 70112
Telephone: (504) 523-3957

CERTIFICATE OF SERVICE

I, the undersigned Michael F. Barry, Esq., attorney for Julius Wilkerson, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that,on the ____

day of April, 1975, I served copies of the foregoing Petition for Writ of Certiorari, including Appendices "A", "B", "C" and "D" thereof, on the United States of America, respondent herein, by leaving three (3) copies thereof at the office of Hon. Mary Williams Cazalas, Assistant U.S. Attorney, 500 St. Louis Street, New Orleans, La. 70130, and by mailing three (3) copies in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, pursuant to Rule 33.2(a) of the Rules of the Supreme Court of the United States.

MICHAEL F. BARRY
Attorney for petitioner Julius Wilkerson
905 Maison Blanche Bldg.
New Orleans, La. 70112

APPENDIX "A"

3678

UNITED STATES of America, Plaintiff-Appellee,

v.

Clarence HILL and Julius Wilkerson a/k/a Moon, and Clarence Diggs, Defendants-Appellants.

No. 74-2028.

United States Court of Appeals, Fifth Circuit.

Feb. 19, 1975.

Defendants were convicted in the United States District Court for the Eastern District of Louisiana at New Orleans, Jack M. Gordon, J., of conspiracy to distribute heroin and to possess heroin with intent to distribute. Defendants appealed. The Court of Appeals, Nichols, Associate Judge of the United States Court of Claims, sitting by designation, held that where certain remarks by the prosecutor could only have been understood as comments on the failure of the defense, as opposed to defendants, to counter or explain a mass of incriminating evidence before the jury, the trial judge did not abuse his discretion in not noticing that any improper comments were made. Absent any showing of prejudice, the prosecutor's congratulating and complimenting the jury for watching attentively, listening to witnesses, observing witnesses' demeanor and defendants' demeanor were likewise not grounds for reversal of conviction, though defendants did not take the stand. That a federal agent used a ruse to get a defendant to open his door did not make entry illegal where full disclosure of identity and warrant was made as soon as the door was opened, and before entry by the officers.

Affirmed.

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INDEXED

1. Criminal Law ⇐721(3)

Where remarks could only have been understood as comments on the failure of defense, as opposed to defendants, to counter or explain testimony of unindicted coconspirators, various police officials and prosecution's other witnesses and exhibits, putting mass of incriminating evidence before jury, trial judge did not abuse discretion in not noticing that any improper comments were made.

2. Criminal Law ⇐713

Absent any showing of prejudice, prosecutor's congratulating and complimenting jury for watching attentively, listening to witnesses, observing witnesses' demeanor and defendants' demeanor did not vitiate conviction, though defendants did not take stand.

3. Drugs and Narcotics ⇐189

That federal agent in course of drug investigation carried attache case similar to those carried by insurance salesmen and replied, when voice inside defendant's door asked who he was, with reference to name of an insurance company did not make entry illegal where full disclosure of identity and warrant was made as soon as door was opened and before entry by the officers. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 401(a)(1), 21 U.S.C.A. §§ 841, 841(a)(1).

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEWIN and SIMPSON, Circuit Judges, and NICHOLS,* Associate Judge.

NICHOLS, Associate Judge:

A jury convicted the appellant-defendants, Clarence Hill, Julius Wilkerson (a/k/a Moon), and Clarence Diggs of conspiracy to possess heroin with intent to distribute, and to distribute heroin, a Schedule I narcotic drug controlled substance, in violation of 21 U.S.C. § 841(a)(1). Diggs, a multiple offender, received a 21-year sentence with a special parole term of 6 years (pursuant to 21 U.S.C. § 841). Wilkerson and Hill received 12-year sentences with special parole terms of 3 years, Hill's sentence to run concurrently with his 8-year sentence in a companion case reported at United States v. Hill, 500 F.2d 315 (5th Cir. 1974), in which Hill was convicted of possession with intent to distribute the identical heroin which forms the basis of the conspiracy in this case. We affirm.

* Of the U. S. Court of Claims, sitting by designation.

I

The relevant facts before the jury were as follows. On October 24, 1971, Wilkerson sent a telegraphic money order for $1,350 to Diggs' home in New York City. In the last week of February 1972, unindicted co-conspirators Barbara Smith and Joyce Picard made a round-trip to New York City from New Orleans during which Barbara Smith picked up at Diggs' New York home a sizeable package of heroin and couriered it back to New Orleans. Upon her return to New Orleans, she exchanged the package with Hill for $300, the agreed wages for the trip.

The next day Hill, Wilkerson, Diggs, Picard and another unindicted co-conspirator, Cora Virgil, returned to Barbara Smith's home with the heroin, and various packaging materials, and spent several hours repacking 40 bundles of heroin into 2,000 little glassine envelopes. The rest of the heroin was left hidden in the Smith home. A week later, Hill and Wilkerson returned and again repacked another 40 bundles into 2,000 glassine envelopes in the Smith home. The following week, the remaining 20 bundles were repacked by Hill and Wilkerson. When they left the Smith home on this occasion, they also took the surplus wrapping materials.

About 3 months later, in the search and seizure involving Hill's home and automobile on July 1, 1972, another 42 bundles

of heroin were turned over to police by Hill and other members of his family, along with $17,991 in cash and a gun.

The search and seizure issues, raised by appellants regarding Hill's home and automobile, were heard and decided in the appeal of Hill's companion conviction, 500 F.2d 315 (5th Cir. 1974), in an opinion by Judge Clark which disposes of all the search and seizure issues raised here, except one discussed *infra*. We are invited by parties other than Hill to reconsider these holdings, but we see no reason to doubt their correctness, and we reaffirm them here.

II

[1] Appellants also argue on appeal their motion for mistrial based on four separate remarks of the prosecutor, Mr. Bowman, in his closing argument. They allege that these remarks were impermissable comments on the defendants' failure to take the stand in their own behalf. However, three of the four remarks could only have been understood as comments on the failure of the *defense* (as opposed to *defendants*) to counter or explain the testimony of the unindicted co-conspirators, the various police officials, and the prosecution's other witnesses and exhibits, putting a mass of incriminating evidence before the jury. None of these three remarks specifically pointed to any or all of the defendants as not having testified. Indeed, we can find no specific reference to defendants' failure to take the stand during the trial in the record. The judge told the jury that the defendants did not have to testify and need not offer evidence. We disapprove of any comments by prosecutor or judge that even indirectly invites the jury's attention to the failure of the defendants to take the stand, but on the facts of this case we cannot say that the trial judge abused his discretion in not noticing that any improper comments were made. None of the statements are comparable to the prejudicial remarks and instructions that resulted in reversal of trial convictions in Fontaine v. California, 390 U.S. 593, 88 S.Ct. 1229, 20 L.Ed.2d 154 (1968),

IV

and in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

[2] The fourth remark occurred in the opening words of the prosecutor's statement, as he congratulated and complimented the jury on their patience, and attention to the various surroundings and events associated with the three-day trial. He said they "watched attentively, listened to the witnesses, observed the witnesses' demeanor, observed the defendants' demeanor * * *" To invite attention to the "demeanor" of a defendant who has not taken the stand is anomalous and could be impermissably prejudicial in some circumstances. There is no showing of any such prejudice here, and the remark was no doubt taken as manifestly it was intended, as meaningless flattery to the jury upon its alert attention to all that happened before it. We will not be understood as prospectively endorsing such a remark for use in future cases: clearly it is contra-indicated.

III

[3] Appellants return to the search and seizure to complain about the ruse used by the Federal agent to get Hill to open his door peacefully to them, at which time the agents disclosed their true identities and search warrant. He carried an attache case similar to those carried by insurance salesmen. He knocked and a voice inside asked who it was. He replied, "Aetna Insurance." Hill then unlocked a wooden door and the agent said: "Federal agents with a warrant." We see no significance if the agent pulled open an unlocked screen door before knocking. Commonly one must do that to knock or ring, if a screen door is fitted in front of a solid door. This does not make a forceful entry out of one otherwise peaceful. In United States v. Beale, 5 Cir., 436 F.2d 573, rev'd on rehearing, 5 Cir., 445 F.2d 977 (1971), cert. denied, 404 U.S. 1026, 92 S.Ct. 697, 30 L.Ed.2d 676 (1972), this court has previously struggled with the ruse problem, concluding that "if entry by deception and wholly without application of force

V

is to be brought within § 3109, it should be by the Supreme Court." (445 F.2d at 978). We think that our prior holding in *Beale* controls the instant case, particularly since here full disclosure of identity and warrant was made as soon as Hill opened the door and before entry by the officers.

Appellant Wilkerson has also urged many other assignments of error, but after careful consideration we find no merit in them, sufficient to require discussion.

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

April 1, 1975

TO ALL COUNSEL OF RECORD

Re: 74-2028 U.S.A. V. HILL

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Anne D. Falvey
Deputy Clerk

cc: Mr. A.J. McNamara
Mr. Michael F. Barry
Mr. Salvadore T. Mule

Mr. Cornelius R. Mousel
Ms. Mary Williams Casalas
Mr. Billy B. Bowman

*As to Julius Wilkerson

VEX

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APPENDIX "C"

7464

UNITED STATES of America, Plaintiff-Appellee,

v.

Clarence HILL, Defendant-Appellant.

No. 73–1098.

United States Court of Appeals,
Fifth Circuit.

Aug. 30, 1974.

Following a remand from the Court of Appeals, 497 F.2d 1367, the United States District Court for the Eastern District of Louisiana, at New Orleans, Herbert W. Christenberry, J., entered a judgment convicting defendant of possession of heroin with intent to distribute and he appealed. The Court of Appeals, Clark, Circuit Judge, held, inter alia, that the recitals in the affidavit for warrant for search of defendant's house could be bolstered by the sworn testimony of agent at the time it was given, that recitals in the affidavit and such additional information were sufficient to justify issuance of warrant, and that warrantless search of automobile was valid.

Affirmed.

1. Searches and Seizures ⇐3.6(4)

Judicial officer may not properly issue warrant to search private dwelling unless he can find probable cause therefor from the facts or circumstances presented to him under oath or affirmation.

2. Searches and Seizures ⇐3.6(2)

"Probable cause" is deemed to exist when facts and circumstances within affiant's knowledge and of which he has reasonably trustworthy information are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.

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7465 UNITED STATES v. HILL

See publication Words and Phrases for other judicial constructions and definitions.

3. Searches and Seizures ⇐3.9

Whether a fact and circumstance matrix validly demonstrates probable cause for issuance of search warrant is a determination committed to neutral and detached magistrate, and judicial review of his determination must be strictly confined to the information which was brought to his attention.

4. Searches and Seizures ⇐3.6(3)

In consideration of affidavit for issuance of search warrant, the issuing magistrate may rely on information to establish probable cause which does not reflect personal knowledge of affiant if a substantial basis for crediting hearsay is presented.

5. Searches and Seizures ⇐3.6(3)

Magistrate, in evaluating affidavit for search warrant which recites the tip of an unnamed informer, must be informed of underlying facts and circumstances from which informant has concluded that the person to be searched is engaged in criminal activities and from which affiant has concluded that the informant is credible or that his information is reliable.

6. Searches and Seizures ⇐3.6(3)

Although hearsay recited in affidavit for search warrant may be insufficient to permit the drawing of crucial inferences necessary to establish probable cause under United States Supreme Court decision, yet such hearsay may be introduced into the probable cause calculus if magistrate can fairly state that the tip, when certain parts have been corroborated by independent sources, is as trustworthy as a tip which would pass muster without independent corroboration.

7. Searches and Seizures ⇐3.6(2)

Affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of

evidence at trial, and in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on use of their common sense.

8. Searches and Seizures ⇐3.9

Issuing magistrate's determination of probable cause should be paid great deference by reviewing courts.

9. Drugs and Narcotics ⇐188

Affidavit of government agent setting forth information obtained from unnamed tipsters regarding narcotics activity was sufficient to justify magistrate in concluding that defendant was engaged in the sale and distribution of heroin and the reliability of informants was adequately corroborated by agent's extrinsic testimony before magistrate to warrant issuance of search warrant for home of defendant. U.S.C.A. Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(c), 18 U.S.C.A.; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

10. Searches and Seizures ⇐3.5

Constitution does not mandate that a sworn statement in support of application for search warrant be reduced to writing. U.S.C.A.Const. Amend. 4.

11. Searches and Seizures ⇐3.6(1)

The providing of additional information under oath by government agent to bolster affidavit for search warrant was permissible in view of rule as then written. Fed.Rules Crim. Proc. rule 41(c), 18 U.S.C.A.

12. Drugs and Narcotics ⇐188

Intelligence gathered by government agent, while executing warrant for search of defendant's house, implicating defendant's automobile in unlawful heroin transaction and recitals in affidavit for search warrant were sufficient to authorize warrantless search of defendant's automobile which was parked nearby home being searched by agents. U.S.C.A. Const. Amend. 4.

13. Criminal Law ⇐993

In view of a record which was devoid of any evidence of indigency of defendant, who was sentenced to a term of eight years in the penitentiary followed by a three-year term of parole in addition to a fine of $15,000, defendant was not entitled to a reduction of fine but defendant could petition for correction or reduction of sentence at such time as he could demonstrate that his fiscal inability to pay fine assessed was causing him to suffer a deprivation of liberty.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BELL, GOLDBERG and CLARK, Circuit Judges.

CLARK, Circuit Judge:

The validity of Clarence Hill's conviction for possession with intent to distribute heroin turns upon the constitutional correctness of searches of his residence and automobile. Our appellate task is to determine whether oral testimony before the issuing magistrate was properly employed to bolster an otherwise deficient affidavit for a search warrant, whether a warrantless search of Hill's automobile was Fourth Amendment-reasonable, and whether his sentence violated the equal protection clause. Under the unique facts of this case, we find the searches viable and affirm Hill's conviction and sentence.

I.

The Residential Search

On July 1, 1972, John Henry Phillips, Jr., an agent of the Bureau of Narcotics and Dangerous Drugs (BNDD), appeared before United States Magistrate Morey L. Sear to request a search warrant for the premises at 2363 N. Robertson Street, the New Orleans home of defendant Clarence Hill. Phillips' affidavit related his belief that Hill was concealing heroin there in violation of 21 U.S.C. § 841(a)(1). To demonstrate

probable cause a lengthy memorandum was attached to his affidavit. The attachment set out tips obtained from four confidential informants and from an anonymous phone caller together with related intelligence gathered by law enforcement officials.

Confidential source one had stated that during the month of June Hill had consigned three bundles of heroin to him for sale by revealing where the contraband was hidden, and that Hill, who was also known as "Hip Cat," was the brother-in-law of a convicted trafficker in heroin. Source two had observed Julius Wilkerson, also known as "Moon," and another man (not Hill) in Hill's 1971 white Buick handling six bundles of heroin as he spoke to them about a purchase of the illicit white powder. Source three had reported that Wilkerson was a "big time heroin pusher" with whom he had discussed the purchase of heroin on several occasions. Source four had told a fellow agent that during the previous month he had obtained heroin from a black male at Hill's address and had taken other persons there to purchase heroin. The continuing BNDD investigation of Hill had also uncovered the fact that another known heroin trafficker, Floyd Dupart, had been seen driving Hill's 1972 Plymouth and that in October of 1971 Wilkerson had sent Hill 1,350 dollars in New York City, which the agents surmised was to finance the purchase of heroin. Furthermore, Agent Phillips had been warned on June 30 by an anonymous female phone caller to "look out for Julius Wilkerson and Clarence Hill because they are selling dope," which she stated was heroin hidden in Hill's residence.

Before he issued the warrant, Magistrate Sear interrogated Phillips under oath as to the basis upon which he had gauged the reliability of each confidential source. Convinced that probable cause existed, the magistrate noted on the affidavit that he had asked the agent further questions and obtained additional information about the informers. As supplemented, he concluded that the affidavit authorized the issuance of a search warrant. Phillips, accompanied by other federal

agents and New Orleans police detectives, executed the warrant by searching Hill's residence that afternoon and seized two bundles of heroin and other narcotics paraphernalia.

At the outset, Hill urges error in the district court's failure to suppress the seized evidence at a pretrial hearing, contending that Phillips' affidavit was a deficient predicate for the magistrate's adjudication of probable cause to search because (1) it did not disclose sufficient underlying circumstances to support the conclusion that Hill was a trafficker and possessor of heroin, and (2) it did not contain sufficient information from which the magistrate could determine that the confidential informants were reliable.

[1-3] The fourth of our Bill of Rights secures people, houses, persons and effects from unreasonable governmental intrusion in terms which are eloquent in their simplicity.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation*, and particularly describing the place to be searched, and the persons or things to be seized. (emphasis added).

A judicial officer "may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation." Nathanson v. United States, 290 U.S. 41, 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933). "Probable cause is deemed to exist 'where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.'" United States v. Melancon, 462 F.2d 82, 89 (5th Cir. 1972), cert. denied, 409 U.S. 1038, 93 S.Ct. 516, 34 L.Ed.2d 487 (1973), *quoting* United States v. Rich, 407 F.2d 934, 936 (5th Cir.), cert. denied, 395 U.S. 922, 89 S.Ct. 1775, 23 L.Ed.2d 239 (1969); Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). Whether a fact and

circumstance matrix validly demonstrates probable cause is a determination committed to a neutral and detached magistrate. *See* Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). It is fundamental that judicial review of his determination must be strictly confined to the information which was brought to his attention. Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958).

[4, 5] In his consideration of an affidavit, the issuing magistrate may rely on information to establish probable cause which does not reflect the personal knowledge of the affiant if "a substantial basis for crediting the hearsay is presented." Jones v. United States, 362 U.S. 257, 269, 80 S.Ct. 725, 735, 4 L.Ed.2d 697 (1960). In Aguilar v. Texas, 378 U.S. 108, 114–115, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964), the Supreme Court propounded a two-pronged standard by which to judge whether an affidavit reciting the tip of an unnamed informer permits the magistrate, rather than the tipster or the investigating police officer, to draw the crucial inferences necessary to establish probable cause from the hearsay facts. He must be informed of the underlying facts and circumstances (1) from which the informant has concluded that the person to be searched is engaged in criminal activities, and (2) from which the affiant has concluded that the informant is credible or his information reliable. United States v. Chavez, 482 F.2d 1268 (5th Cir. 1973).

[6] In the event the hearsay fails to pass muster under *Aguilar*, it may yet be introduced into the probable cause calculus if the magistrate can fairly state that "the tip, . . . when certain parts have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* test without independent corroboration." Spinelli v. United States, 393 U.S. 410, 415, 89 S.Ct. 584, 588, 21 L.Ed.2d 637 (1969); *see, e. g.*, United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974); United States v. Summerville, 477 F.2d 393 (5th Cir. 1973); United States v. Black, 476 F.2d 267 (5th Cir.

1973); United States v. McNally, 473 F.2d 934 (3rd Cir. 1973); United States v. Marihart, 472 F.2d 809 (8th Cir. 1972) (en banc), petition for cert. filed, 42 U.S.L.W. 3611 (U.S. Apr. 8, 1974) (No. 73–1561); United States v. Star, 470 F.2d 1214 (9th Cir. 1972); United States v. Sultan, 463 F.2d 1066 (2d Cir. 1972); United States v. Fuller, 441 F.2d 755 (4th Cir.), cert. denied, 404 U.S. 830, 92 S.Ct. 74, 30 L.Ed.2d 59 (1971). Most recently, in United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971), the Court held that a cumulation of circumstances recited in an affidavit may be sufficient to support the conclusion that the confidential informant was credible so as to meet the second prong of *Aguilar*.

> These [circumstances] were: (1) the allegation of the affiant that he regarded the informant as "prudent"; (2) the detail provided in the tip; (3) the fact that the affidavit also alleged that the accused had a reputation for being a trafficker in nontaxpaid liquor; and (4) the fact that the information given, with the allegations of the informant's purchases, was a declaration against the informant's penal interest.

United States v. Chavez, *supra*, 482 F.2d at 1271.

[7, 8] Applying the Courts' tests to the case before us, the threshold question is did Phillips make sufficient information of a reliable nature known to Magistrate Sear to warrant a prudent man in believing that the defendant had committed an offense? The personal knowledge of source one connected Hill directly with the sale of heroin and revealed a *modus operandi*. Source four, with specificity, personally established Hill's residence as the scene of numerous transactions in heroin. The information provided by the other confidential sources principally described Hill's associates as dope pushers but this, as well as the warning provided by the anonymous phone caller, provided some corroborative support for the information supplied by sources one and four.

> Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v.

Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964); affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U.S. 300, 311, 87 S.Ct. 1056, 1062, 18 L.Ed.2d 62 (1967); in judging probable cause, issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 745, 13 L.Ed.2d 684 (1965); and their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, [*supra*], 362 U.S. at 270–271, 80 S.Ct. at 734–736; Spinelli v. United States, [*supra*], 393 U.S. at 419, 89 S.Ct. at 590–591.

United States v. Melancon, *supra*, 462 F.2d at 89–90.

[9] Unquestionably, the information collected from the tipsters by Agent Phillips, if true, would persuade a man of reasonable caution that Hill, in all probability, was selling heroin and concealing his supplies at his home. Since the affidavit reveals sufficient facts and circumstances, albeit hearsay, founded in personal observation and participation, to permit Magistrate Sear to determine whether sources one through four were justified in concluding that Hill was engaged in the sale and distribution of heroin and that the criminal activity was transpiring at his residence, it meets the first prong of the *Aguilar* standard. *See* United States v. Banks, 465 F.2d 1235 (5th Cir. 1972).

Agent Phillips was less rigorous in his written presentation of the facts and circumstances upon which he based his belief that his informants were supplying truthful information. Although the informer need not be identified, Gonzales v. Beto, 425 F.2d 963 (5th Cir.), cert. denied, 400 U.S. 928, 91 S.Ct. 194, 27 L.Ed.2d 189 (1970), only Phillips' identification of source three, whom he asserted in the affidavit to have been responsible for the convictions of numerous narcotics offenders, met the second prong of *Aguilar*. United States v. Mendoza, 433

F.2d 891 (5th Cir. 1970). We need not reach the questions of whether the hearsay intelligence of each informer was adequately corroborated under *Spinelli* standards by the other independent hearsay information or the BNDD agents' independent observations, or whether the affidavit, considered in its totality, produced a constitutionally sufficient result in conformity with the cumulative *Harris* equation, for we hold that the reliability and credibility of each informant was established to the satisfaction of *Aguilar* by Phillips' extrinsic testimony to the magistrate.

At the pre-trial suppression hearing, Agent Phillips testified as to the additional information he orally supplied Magistrate Sear when the latter questioned Phillips about the reliability of his informants at the time Phillips applied for the search warrant. Although sources one and two had not made any cases for the BNDD, the agent replied that both had furnished information about the New Orleans heroin traffic which had proven to be true and correct. Moreover, Freddie Williams was known to the BNDD as "one of the largest heroin traffickers who has ever resided in New Orleans." Phillips described source two as a reliable, cooperating individual. The sufficiency of this representation is bolstered by the specificity of the information source two provided. The reported heroin negotiations were traced in detail by disclosure of dates, times, names of individuals, pinpoint location of a street corner agreement, Hill's auto license number, and the address of the ultimate supplies. The affidavit itself revealed that source three, who had furnished Phillips information since 1963, had been responsible for the arrest and conviction of numerous narcotics offenders. Although he was personally acquainted with the first three confidential informants, Phillips had learned of source four and his information just two days earlier from another BNDD officer, who had stated that source four was a good informer, having supplied true and correct information without, at that time, having made any cases. With this additional background Magistrate Sear ini-

dated the following handwritten notation on the affidavit: "Further interrogation of Agent Phillips including information with regard to his informers supports issuance of this warrant."

Phillip's extra-affidavit statements were more than enough to supply the deficits from *Aguilar*'s second requirement. According to Phillips, each informant had, at the least, supplied BNDD agents in the past with information which had proven to be true and correct. "[S]uch a factual statement of past reliability provides sufficient basis for the magistrate to gauge independently the reliability of the informer." United States v. Mendoza, supra, 433 F.2d at 894. Each informant furnished information that was based on personal observation and substantiated by instances of past reliability. Moreover, Phillips spoke from personal knowledge as to the credibility of and the information provided by sources one through three. That the tip and reliability of source four were communicated to the affiant by another officer is of no decisional moment. United States v. Simpson, 484 F.2d 467 (5th Cir. 1973); United States v. Impson, 482 F.2d 197 (5th Cir. 1973), cert. denied, 414 U.S. 1009, 94 S.Ct. 371, 38 L.Ed. 246 (1974); United States v. Trabucco, 424 F.2d 1311 (5th Cir.), petition for cert. dismissed, 399 U.S. 918, 90 S.Ct. 2224, 26 L.Ed.2d 785 (1970).[1] Such personal observations of a fellow officer pursuing the same investigation can be presumed reliable. United States v. Hayles, 471 F.2d 788 (5th Cir.), cert. denied, 411 U.S. 969, 93 S.Ct. 2159, 36 L.Ed.2d 690 (1973). The fact that Phillips rather than his fellow officer imparted this particular information to the magistrate in no way attenuates its accuracy or the credibility of the informant.

[10, 11] Hill contends, however, that Fed.R.Crim.P. 41(c) does not permit a federal magistrate to rehabilitate a defi-

1. *See* United States v. Stratton, 453 F.2d 36 (8th Cir.), cert. denied, 405 U.S. 1069, 92 S.Ct. 1515, 31 L.Ed.2d 800 (1972); *see also* Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

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cient affidavit with oral testimony. It has been an accepted principle in this and other circuits that a federal court, reviewing a State conviction, may consider an affiant's oral testimony, extrinsic to the written affidavit, which is sworn before the issuing magistrate, in determining whether the warrant was founded on probable cause. *See, e. g.*, Campbell v. Minnesota, 487 F.2d 1 (8th Cir. 1973); United States ex rel. Gaugler v. Brierley, 477 F.2d 516 (3d Cir. 1973); Boyer v. Arizona, 455 F.2d 804 (9th Cir. 1972); Radcliff v. Cardwell, 446 F.2d 1141 (6th Cir. 1971); Frazier v. Roberts, 441 F.2d 1224 (8th Cir. 1971); United States ex rel. Pugach v. Mancusi, 411 F.2d 177 (2d Cir.), cert. denied, 396 U.S. 889, 90 S.Ct. 172, 24 L.Ed.2d 163 (1969); Sherrick v. Eyman, 389 F.2d 648 (9th Cir.), cert. denied, 393 U.S. 874, 89 S.Ct. 167, 21 L.Ed.2d 144 (1968); *See also* Lopez v. United States, 370 F.2d 8 (5th Cir. 1966).[2] The constitution does not mandate that a sworn statement in support of an application for a search warrant be reduced to writing. "The Fourth Amendment requires *only* that the judicial officer issuing a search warrant be supplied sufficient information, under oath or affirmation, which would support an independent judgment that probable cause exists for the warrant's issuance." United States ex rel. Gaugler v. Brierley, *supra*, 477 F.2d at 522 (footnote omitted); *see* Boyer v. Arizona, *supra*; Sherrick v. Eyman, *supra*. In federal criminal proceedings the issuance of search warrants is subject to the added governance of Fed.R.Crim.P. 41(c), which, as of the date the warrant *sub judice* was issued, provided:

> (c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and

2. In two cases arising from state criminal convictions the Supreme Court intimated that sworn oral testimony before a state magistrate in an application for a search or arrest warrant may constitutionally supplement an affidavit which, on its face, fails to establish probable cause for its issuance. *See* Whiteley v. Warden, Wyoming State Penitentiary, *supra*, 401 U.S. at 565 n. 8, 91 S.Ct. at 1035; Aguilar v. Texas, *supra*, 378 U.S. at 109 n. 1, 84 S.Ct. at 1511; United States ex rel. Gaugler v. Brierley, *supra*, 477 F.2d at 520 522.

establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

The notes of the advisory committee state that the rule was intended to codify and restate existing law and practice as of the date it became effective on October 20, 1949.

The sworn additional information provided by Agent Phillips adequately apprised Magistrate Sear of circumstances indicating the past and present reliability of the four informers. In view of the fact that the magistrate's own conscientious attention to his duty enabled him to satisfy himself of the persuasiveness of the facts purporting to show probable cause and that this court can readily determine that the warrant and concomitant search comport with constitutional requirements, we join the Eighth and Tenth Circuits in holding this supplementation was permissible under Rule 41(c) as it was written at the time Hill's search warrant issued. See United States v. Beasley, 485 F.2d 60 (10th Cir. 1973); United States v. Marihart, *supra*; Leeper v. United States, 446 F.2d 281 (10th Cir.), cert. denied, 404 U.S. 1021, 92 S.Ct. 695, 30 L.Ed.2d 671 (1971); United States v. Berkus, 428 F.2d 1148 (8th Cir. 1970); Lopez v. United States, *supra*; Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966).

Under different facts, the Ninth Circuit decided that physical incorporation of all information into the affidavit was required. "[U]nder Rule 41(c) the written affidavit presented to the federal issuing officer and to the reviewing court must alone establish that probable cause exists." United States v. Anderson, 453 F.2d 174, 177 (9th Cir. 1971); *accord* United States v. Norcikis, 481 F.2d 1177 (7th Cir. 1973) (dictum); United States v. Hatcher, 473 F.2d 321 (6th Cir. 1973) (dictum); United States v. Bailey, 458 F.2d 408 (9th Cir. 1972) (dictum); United States v. Sterling, 369 F.2d 799, 802 n. 2 (3rd

Cir. 1966) (dictum); see United States v. Pinkerman, 374 F.2d 988 (4th Cir. 1967) (dictum); Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966) (dictum); *see also* United States v. Freeman, 358 F.2d 459 (2nd Cir.) (dictum), cert. denied, 385 U.S. 882, 87 S.Ct. 168, 17 L.Ed.2d 109 (1966).

The *Anderson* Court reasoned that the "four corners" of the affidavit had to constitute the alpha and omega for judging probable cause in order to insure that "the reviewing court may determine whether the constitutional requirements have been met without reliance upon faded and often confused memories." United States v. Anderson, *supra*, 453 F.2d at 177.

The reasoning supporting the Ninth Circuit's rule is not apropos here. Phillips did not attempt to supply Magistrate Sear with remote or minute details of Hill's conduct based upon his ability to recall bits and pieces of past conversations. His supplementation only furnished facts known to him and his fellow-officer that indicated the informers' information should be credited. Phillips' recall of this disclosure shows that his memory of these matters was neither clouded nor befuddled. We can conclude without difficulty that the warrant was duly authorized. Furthermore, this situation furnishes no occasion to apply the exclusionary rule to bar the evidence of Hill's criminality that was obtained in executing the warrant. Phillips acted properly in going to the magistrate and seeking a warrant. Magistrate Sear acted properly in calling for additional information to demonstrate credibility. Thus, the only error attributable to the procedure they followed is a technical one that would in no way serve the deterent purposes of the rule.

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960), *quoted in* United States v. Calandra,

414 U.S. 338, 94 S.Ct. 613, 618, 38 L.Ed.2d 561 (1974). This is especially so since Rule 41(c) has now been amended to expressly permit oral interrogation by the magistrate.[3]

By these express new provisions, the Rule has clarified police and magisterial conduct for the future in a more effective manner than the exclusionary rule ever could. Magistrate Sears' handwritten notation on the face of the affidavit signaled his reliance on the additional information he obtained from Agent Phillips. That he was not omniscient enough to also transcribe and incorporate the agent's testimony is not fatal since the facts obtained were within the agent's direct knowledge and sufficiently uncomplicated to enable the court to obtain a reliable reproduction.

Although we do not overlook the fact that a different result would obtain if the affidavit had been procured after October 1, 1972, it would be illogical and unjust to overturn this conviction on the basis of a technical default that in no wise mitigated the reliability of the information in the affidavit or its procedural compliance with the Fourth Amendment. *See* United States v. Mendoza, 491 F.2d 534 (5th Cir. 1974); United States v. Soriano, 482 F.2d 469 (5th Cir. 1973); rev'd

3. In pertinent part the amended rule provides:
(c) *Issuance And Contents.* A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. *Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.* (Italicized language added by Amendment).
We of course note that under the amended rule such interrogation and the affiant's responses must be recorded and made a part of the affidavit.

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on other grounds, 497 F.2d 147 (5th Cir. 1974) (en banc); United States v. Nolan, 413 F.2d 850 (6th Cir. 1969).

> [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

United States v. Ventresca, *supra*, 380 U.S. at 108, 85 S.Ct. at 746. The district court's denial of defendant's motion to suppress the physical evidence seized during the search of Hill's residence must be affirmed.

II.

The Automobile Search

The BNDD agents and police officers executed the search warrant at Hill's residence on the afternoon of July 1, 1972. After the agents had entered and secured the house, Agent Phillips gave Hill a copy of the warrant and advised him of his constitutional rights. Hill denied there was heroin on the premises, but did relinquish a gun and 17,991 dollars in cash. The agents began searching and soon discovered a box of glassine envelopes of the kind commonly used to package heroin.

When the officers began to "get hot," Hill asked whether he would be the only one taken to jail if he surrendered the heroin. At Hill's request Phillips signed his name to an agreement written on the back of the search warrant in which

the agent promised that if Hill surrendered all the heroin in his possession and if he were the sole person responsible for it, his wife and child, who were also present, would not be arrested. At this juncture Hill pointed to a lamp fixture next to him from which the agents retrieved two bundles of heroin wrapped in a brown packet.

While the agents continued to search, detectives of the New Orleans Police Department spoke with Hill's 7-year old son in the rear of the house away from his parents. The officers showed him a bundle of the seized heroin and asked if he had ever seen his father handling this sort of white powder. The child replied that he had seen his father carry a bag containing bundles of the white powder out to his car, which was parked around the corner. Goading him on, the officers told him he did not know what he was talking about and promised him $3.75 if he would show them where the car was located. The child then repeated to Phillips his story that if the white powder was not in the kitchen closet with the money, it would be in the car. Agent Phillips picked up a set of car keys laying on a table and the child led the officers half a block to Hill's Buick, which was searched and found to contain 40 bundles of heroin and other narcotics paraphernalia.

[12] Hill contends that the warrantless search of his automobile was conducted in the absence of exigent circumstances and, therefore, was unconstitutional under the rationale of Coolidge v. New Hampshire, *supra*. That the agents had probable cause to seize the vehicle is undisputed. The intelligence gathered by Phillips and recited in the affidavit implicating the Buick in unlawful heroin transactions was reinforced by fresh information provided by Hill's son that if Hill's cache was not in the house it would be found in the car. Moreover, the known accessibility of the automobile to Hill's confederates supplied exigent circumstances for a seizure despite the fact that the BNDD agents had immobilized Hill, his wife and his car keys.

In United States v. Soriano, 497 F.2d 147, 149 (5th Cir. 1974) (en banc), this court, relying on Chambers v. Maroney, 399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970), reasoned "that where automobiles and their contents are concerned, circumstances which justify an immediate seizure as reasonable justify an immediate search as well."

That Hill's reliance upon Coolidge v. New Hamphsire, *supra*, is unfounded is made clear by the following language from Cardwell v. Lewis, — U.S. —, —, 94 S.Ct. 2464, 2471, 41 L.Ed.2d — (1974):

> Since the Coolidge car was parked on the defendant's driveway, the seizure of that automobile required an entry upon private property. Here, as in Chambers v. Maroney, 399 U.S. 42 [90 S.Ct. 1975, 26 L.Ed.2d 419] (1970), the automobile was seized from a public place where access was not meaningfully restricted. This is, in fact, the ground upon which the *Coolidge* plurality opinion distinguished *Chambers*, 403 U.S., at 463 n. 20, 91 S.Ct. at 2036. See also Cady v. Dombrowski, 413 U.S. 266, at 446–447, [93 S.Ct. 2535, at 2530–2531, 37 L.Ed.2d 596].

The intervention of an impartial magistrate between the uncontrolled discretion of police officers and the citizens they are sworn to serve is always to be preferred. Solid judicial precedent has, however, mitigated the inflexible warrant requirement as to automobile searches. In the circumstances of the case before us today we hold that the warrantless search of Hill's automobile comported with the Fourth Amendment. See United States v. Maspero, 496 F.2d 1354 (5th Cir. 1974); United States v. Davis, 496 F.2d 1026 (5th Cir. 1974); United States v. Frick, 490 F.2d 666 (5th Cir. 1973).

III.

The Sentence

[13] After he found Hill guilty as charged in the indictment, the district judge sentenced the defendant to a term of

8 years in the federal penitentiary to be followed by a special 3-year term of parole. In addition, he ordered the defendant to pay a fine of 15,000 dollars or stand committed. Hill contends that because he is indigent, the fine denies him equal protection of the law. This sentence lay well within the maximum prescribed by 21 U.S.C. § 841(b)(1)(A), which authorized imprisonment for up to 15 years and a fine of not more than 25,000 dollars. In Williams v. Illinois, 399 U.S. 235, 243, 90 S.Ct. 2018, 2023, 26 L.Ed.2d 586 (1970), the Supreme Court held "that a state may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute . . . ." In Tate v. Short, 401 U.S. 395, 398, 91 S.Ct. 668, 671, 28 L.Ed.2d 130 (1971), the Court adopted the view, previously expressed by four of its members in Morris v. Schoonfield, 399 U.S. 508, 509, 90 S.Ct. 2232, 2233, 26 L.Ed.2d 773 (1970), that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." It also emphasized, however, that there is no constitutional infirmity in imprisoning "a defendant with the means to pay a fine who refuses or neglects to do so." 401 U.S. at 400, 91 S.Ct. at 672.

Neither Hill nor his counsel entered any objection when the district court imposed sentence. The present record is devoid of any evidence of Hill's indigency; indeed indigency is contraindicated by the fact that almost 18,000 dollars in cash was recovered at his residence. Nothing establishes that the sentence and fine imposed now offend the equal protection clause. The defendant may petition the district court under Fed.R.Crim.P. 35 for correction or reduction of sentence at such time as he can demonstrate that his fiscal inability to pay the fine assessed is causing him to suffer a deprivation of liberty. Should the government resort to alternatives other

than incarceration to enforce its interest in the payment of fines, Hill may raise his equal protection rights there also. *See* Tate v. Short, *supra*, 401 U.S. at 399, 91 S.Ct. at 671.

The decision of the district court is

Affirmed.

APPENDIX "D"

FIRST AMENDMENT, U.S. Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

THIRD AMENDMENT, U.S. Constitution:

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

FOURTH AMENDMENT, U.S. Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT, U.S. Constitution:

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising

in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT, U.S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

NINTH AMENDMENT, U.S. Constitution:

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Supreme Court, U. S.
FILED
JUN 20 1975
MICHAEL RODAK, JR., CLERK

No. 74-1357

In the Supreme Court of the United States

OCTOBER TERM, 1974

JULIUS WILKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that evidence introduced against him at trial should have been suppressed because it was the fruit of a warrantless search which petitioner claims was invalid because probable cause for the search was in part predicated upon information obtained from a co-defendant's seven-year-old child. He also contends that allegedly prejudicial remarks in the prosecutor's closing argument require reversal.

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of having conspired to possess and distribute heroin in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to twelve years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. A; *United States* v. *Hill*, 508 F.2d 345).

---

[1]Also convicted were co-defendants Clarence Hill and Clarence Diggs.

The evidence showed that between October 1971 and February 1972, petitioner, co-defendants Clarence Diggs, and Clarence Hill and unindicted co-conspirators Barbara Smith, and Joyce Picard arranged for and effected the transportation of heroin from New York City to New Orleans. Together with Cora Virgil (another unindicted co-conspirator), they spent the next two weeks repacking 100 bundles of heroin into more than 4,000 glassine envelopes. On July 1, 1972, agents of the Bureau of Narcotics and Dangerous Drugs (BNDD) seized 42 bundles of heroin, $17,991 in cash and a gun from Clarence Hill's home and automobile.

1. On July 1, 1972, agents of the Bureau of Narcotics and Dangerous Drugs executed a search warrant at the home of co-defendant Clarence Hill (Tr. 220). While federal agents were searching Hill's house, New Orleans police searching the backyard met and spoke with Hill's seven-year-old son at the back of the house away from his parents. The boy was asked if he had ever seen his father handling white powder. He replied that there were bags of white powder in his father's car (if they were not in the kitchen cupboard), a white Buick, which was parked around the corner. The boy then led the officers to the car, where they opened it with keys taken from the house, and discovered 40 bundles of heroin and other narcotics paraphernalia (Suppression Hearing Tr. 104-106, 108-109, 122, 127-129).[2]

[2]The Fifth Circuit had occasion in a companion case to discuss in detail the facts relating to the searches of Hill's home and automobile. See *United States* v. *Hill*, 500 F.2d 315; Pet. App. C. This Court recently denied co-defendant Hill's petition for a writ of certiorari in that case (No. 74-5512, certiorari denied, February 18, 1975). Following affirmance of his conviction in the instant case (508 F.2d 345), Hill again raised questions relating to the searches in his petition for a writ of certiorari which is now pending before this Court (No. 74-6202; see Memorandum for the United States in Opposition, p. 5, n. 7).

Petitioner lacks standing to challenge the search of co-defendant Clarence Hill's car and the questioning of Hill's son. He was not present at the time of the search, he has demonstrated no proprietary or possessory interest in the automobile, he was not charged with an offense requiring possession, and it was not his son who was questioned. See *Brown* v. *United States*, 411 U.S. 223. The mere fact that petitioner was a co-defendant and co-conspirator of one whose Fourth Amendment rights allegedly were invaded does not confer standing upon him to complain of an unlawful search and seizure. *Brown* v. *United States, supra; Alderman* v. *United States*, 394 U.S. 165; *United States* v. *Frick*, 490 F.2d 666 (C.A. 5), certiorari denied *sub nom. Peterson* v. *United States*, 419 U.S. 831; *United States* v. *Howell*, 470 F.2d 1064 (C.A. 9); *United States* v. *Bell*, 457 F.2d 1231, 1239 (C.A. 5); *United States* v. *Goldenstein*, 456 F.2d 1006 (C.A. 8); *United States* v. *Price*, 447 F.2d 23 (C.A. 2), certiorari denied, 404 U.S. 912; *United States* v. *Humphrey*, 409 F.2d 1055 (C.A. 10).[3]

Assuming, *arguendo*, that petitioner has standing to contest the search and seizure, the court of appeals properly concluded that the warrantless seizure of the heroin from co-defendant Hill's automobile was reasonable. The validity of the search and seizure is addressed in our Memorandum in Opposition in *Hill* v. *United States*, No. 74-6202, certiorari pending (*supra*, note 2), upon which we rely.[4]

[3]Petitioner's argument is addressed to the propriety of obtaining from a suspect's minor child information incriminating the parent. Petitioner contends that such a procedure is fundamentally offensive and in derogation of privacy rights secured by the Constitution. Even if the proposition petitioner advances were correct, petitioner has no standing to raise the issue since the alleged rights derive from the parent-child relationship. In this case petitioner can, of course, assert no parental interest.

[4]A copy of our opposition in *Hill* will be sent to petitioner's counsel.

2. Petitioner next contends that the district court erred in not granting a requested mistrial after the prosecutor made the following remarks during closing argument:

> I want to thank you * * * for your attentiveness that you have shown over the last three days. You have done your duty as a jury. I have noticed you as you have watched attentively, listen [*sic*] to the witnesses, observed the witnesses' demeanor, observed the defendants' demeanor and everything that went on in the courtroom * * * [Tr. 488].
>
> * * * * *
>
> I submit to you that even an act as innocent as the sending of a money order is an overt act in furtherance of the conspiracy, because there is only one logical conclusion that you can draw from the evidence that's been presented, that the only reason that the money order was sent, you have heard no other reason for the money order to be sent, was that it was to purchase heroin with, heroin from the streets of New York City to be distributed here in the Eastern District of Louisiana, here on the streets of New Orleans. There is no other evidence presented, other than the association between these three individuals was for anything, but to distribute heroin [Tr. 491-492].
>
> * * * * *
>
> Thus, ladies and gentlemen, through that evidence that you heard from the witness stand, upon your oath to truly consider the evidence presented, the Government submits that you must return upon the only evidence presented, that there was a conspiracy between Clarence Hill, Julius Wilkerson, Clarence Diggs and Joyce Banks Picard, Cora Virgil, Barbara Smith,

> the other conspirators named and upon the evidence presented that you will return the only true and just verdict, that of guilty as charged [Tr. 500].

At the conclusion of the prosecutor's argument, petitioner moved for a mistrial on the grounds that the remarks prejudiced the jury by referring to petitioner's failure to testify; the motion was denied (Tr. 501-502). During its instructions to the jury, the court apprised the jury that the defendants were under no obligation to testify or offer evidence and that no adverse inference could be drawn from a defendant's failure to testify (Tr. 561).

Petitioner complains that the initial remarks of the prosecutor, thanking the jury for its attentiveness, were prejudicial because the prosecutor thereby called attention to the defendants' demeanor during trial. Juries undoubtedly do observe the demeanor of defendants during trial, whether or not they testify. A prosecutor's observation to this effect, without more, cannot reasonably be construed as a comment upon a defendant's failure to testify. Moreover, the court of appeals expressly found that there was no showing of prejudice to petitioner in the circumstances of this case and stated that "the remark was no doubt taken as manifestly it was intended, as meaningless flattery to the jury upon its alert attention to all that happened before it" (Pet. App. A 47).

With respect to the other allegedly prejudicial remarks, the court of appeals correctly observed (Pet. App. A 46-47):

> * * * [These] remarks could only have been understood as comments on the failure of the *defense* (as opposed to *defendants*) to counter or explain the testimony of the unindicted co-conspirators, the various police officials, and the prosecution's other witnesses

> and exhibits, putting a mass of incriminating evidence before the jury. None of these three remarks specifically pointed to any or all of the defendants as not having testified. Indeed, we can find no specific reference to defendants' failure to take the stand during the trial in the record. The judge told the jury that the defendants did not have to testify and need not offer evidence. * * * None of the statements are comparable to the prejudicial remarks and instructions that resulted in reversal of trial convictions in *Fontaine* v. *California*, 390 U.S. 593 * * *, and in *Griffin* v. *California*, 380 U.S. 609 * * * [emphasis in original].

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

Supreme Court, U. S.
FILED
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REPLY MEMORANDUM FOR PETITIONER JULIUS WILKERSON

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1357

JULIUS WILKERSON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER JULIUS WILKERSON

Petitioner, Julius Wilkerson, respectfully submits this Reply Memorandum, pursuant to Rule 24(4) of the Rules of this Honorable Court, in order to

address himself to several points first raised in the Memorandum of the United States in Opposition.

SEARCH OF CO-DEFENDANT'S VEHICLE: PETITIONER'S "STANDING"

At page 3 of its Memorandum in Opposition, the Government argues:

> Petitioner lacks standing to challenge the search of co-defendant Clarence Hill's car and the questioning of Hill's son. He was not present at the time of the search, he has demonstrated no proprietary interest in the automobile, he was not charged with an offense requiring possession, and it was not his son who was questioned. See Brown v. United States, 411 US 223. The mere fact that petitioner was a co-defendant and co-conspirator of one whose Fourth Amendment rights allegedly were invaded does not confer standing upon him to complain of an unlawful search and seizure...(citations omitted)

Conceding that petitioner Wilkerson has made no showing that he enjoys any of the three alternative prerequisites

for standing enumerated by this Honorable Court in Brown v. US, supra, and furthermore is not a parent of young John Kennedy Hill, petitioner nevertheless submits that under the circumstances of this case he does enjoy standing to complain of the Government's conduct, for the following reasons:

I.

Prior to the 1972 amendment thereof, Rule 41 of the Federal Rules of Criminal Procedure purported to authorize only a "person aggrieved" by an unconstitutional search and seizure to move the district court for suppression of evidence and return of property. As a result of the 1972 amendment of Rule 41, however, only the present Rule 41(e), which governs only the motion for return of property, retains the "person aggrieved"

language, while the present Rule 41(f), governing the motion to suppress, merely provides: "A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12."

Thus it would appear, from a reading of the relevant Rule, that the traditional legislative requirement for standing, as expressed in the shorthand term "a person aggrieved", has been repealed.

II.

Petitioner, in his petition for writ of certiorari, invoked the rationale of this Court in Griswold v. Connecticut (1965) 381 US 479 in support of his contention that the Government agents' employment of young Hill infringed upon and violated a constitutionally protected right of "privacy"

adherent to the parent-child relationship. It is interesting to note that in Griswold---a prosecution mounted not against the marriage partners whose Ninth Amendment "privacy rights" were held violated, but rather against the physician and Planned Parenthood officer who provided contraceptive counselling to such married persons---the Court initially confronted an objection to the defendants' standing to complain of a violation of the constitutionally protected zone of privacy enjoyed by husband and wife in the marriage relation, and rejected the state's argument, stating:

> This case is more akin to Truax v. Raich, 239 US 33, where an employee was permitted to assert the rights of his employer; to Pierce v. Society of Sisters, 268 US 510, where the owners of private schools were entitled to assert the rights of potential pupils and their parents; and to Barrows v. Jackson,

346 US 249, where a white defendant, party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit...The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless these rights are considered in a suit involving those who have this kind of confidential relation to them.

"JUNIOR AGENT INDUCTION" PRECEDED THE SEARCH OF HILL'S CAR

At page 3 of the Memorandum in Opposition, the Government adopts be reference its Memorandum in Opposition filed in Hill v. US, No. 74-6202 on this Court's docket. In that Memorandum, in footnote 7 at page 5 thereof, the Government alleges, with respect to the federal agents' "enlistment" of Hill's 7-year-old son as a "junior agent" in the process of eliciting information about

his father's illegal drug activities,

that:

> ...The record reveals that no promises or inducements were made to the boy prior to the search of the car. Rather, the $3.75 was given to the boy in small amounts by several agents on the way back from the car after the agents began kidding one another about rewarding the boy for his help. The "junior agent induction" also occurred following the search...

It is undisputed that the $3.75 was paid young Hill after the search and seizure at his father's automobile. However, the record of the suppression hearing clearly indicates that the "junior agent induction" occurred prior to the search of the vehicle, as part of the "buddy" relationship fostered by the agents with the boy in order to elicit information concerning his father's possession of contraband. See Agent Phillips' testimony in the printed

Supplemental Appendix at pp. 109-112.

Although the payment of money to a child as reward for information against his father is repugnant enough, this is not the thrust of petitioner's complaint, for a far more insidious threat is involved when agents of the state purport to formally enlist a 7-year-old's aid as a "special agent" whose duties include providing such information. While the lesser evil---the reward---occurred subsequent to the search, the greater evil---the "junior agent induction"---preceded the search and even produced the information on the basis of which the agents found probable cause to search the vehicle. For this reason, petitioner contends the fruits of such search should have been suppressed as evidence.

CLOSING ARGUMENT:
PREJUDICIAL REMARKS BY PROSECUTOR

Pretermitting repetition herein the arguments advanced in petitioner's petition for certiorari pertaining to the Desmond and Flannery cases decided by the First Circuit Court of Appeal which conflict with the decision of the Court below, petitioner would nevertheless respectfully remind this Court that, with respect to the distinction between "failure of the defendants" and "failure of the defense" to counter or explain prosecution evidence, it must be borne in mind that jurors are laymen, not trained or versed in nice legal distinctions. While the distinction involved is a valid one, and in most cases readily understood and easily applied to the circumstances of the case, nevertheless generations of prosecutors have devised

innumerable ingenious methods of "skirting border" between the two concepts, a technique which is often followed by conviction, the cause and effect relationship being incapable of determination absent interrogation of jurors concerning their deliberations.

In the instant case, Wilkerson's participation in the conspiracy was evidenced only by the testimony of the accomplice Barbara Smith and the evidence of his sending a money order to co-defendant Hill at co-defendant Diggs' New York address. All the other evidence adduced by the Government implicated either Hill or Diggs or unindicted co-conspirators.

The jury was properly instructed to receive the testimony of an accomplice with caution (R. 540), and, in

the course of its deliberations, the following chronology of events occurred:

1:10 pm---jury began deliberating (R.562)

3:55 pm---court received note from foreman: "We have discussed all the evidence in extreme and cannot reach a unanimous decision. We await further instructions." (R.564)

4:00 pm---court instructed jury to continue deliberations (R.564-565)

4:05 pm---court received note from foreman: "Re: Intent to distribute and to distribute heroin. Does possession of and packaging of heroin meet this intent? Re: Conspiracy. Does only one of the defendants together with one of the non-indicted co-conspirators constitute conspiracy? Would like to have instructions provided in open court." (R.565)

4:20 pm---court gave instructions to jury in open court (R.563-571)

4:35 pm---jury resumed deliberations (R.571)

4:40 pm---pursuant to request of defense counsel, court gave additional instructions to the jury (R. 573-576)

4:50 pm---jury resumed deliberations (R.576)

5:55 pm---due to illness of juror, jury sent home after being instructed not to discuss case and to return on morrow (R.577-580)

10:15 am (following day) jury resumed deliberating (R.581)

11:30 am--court received note from foreman: "We have reached a unanimous decision on two of the defendants and are deadlocked on one. Does the decision have to be made on all defendants. We await your further instructions." (R.581)

11:40 pm--court instructed jury to continue deliberations (R.532-583)

11:45 pm--jury resumed deliberations (R.583)

1:25 pm---jury returned unanimous verdict of guilty as to all three defendants (R.583)

The question "Does only one of the defendants together with one of the non-indicted co-conspirators constitute conspiracy?" is indicative that the jury did not readily credit co-conspirator

Barbara Smith's testimony concerning petitioner's involvement, since Clarence Hill was certainly far more deeply implicated by the evidence than was petitioner, of for that matter, even Clarence Diggs.

Against this background, then, the money order became the crucial factor in determination of Wilkerson's guilt/innocence. The transmission of a money order of course is an act innocent in itself, although it may be done in furtherance of an unlawful objective. The Government alleged that the transmission of the money order was an overt act in furtherance of the conspiracy, but failed to adduce any evidence bearing directly on the transaction which would indicate a nexus with narcotics traffic; instead, the Government argued in closing

argument:

> ...There is no other evidence presented, other than the association between these three individuals was for anything, but to distribute heroin...

urging the jury to infer from the absence of contradictory or explanatory evidence that the money order was part of a narcotics conspiracy, when the only apparent competent witnesses to the intentions of the parties to the transaction were petitioner and his co-defendant Hill, and perhaps the co-defendant Diggs. These circumstances, taken together with the prosecutor's invitation to consider the demeanor of the witnesses and of the defendants, demonstrates an indirect "comment" on the failure of the defendant Wilkerson to testify in his own behalf.

Furthermore, the "curative" effect

of the standard instruction on failure of defendants to testify included in the court's charge to the jury must be weighed in the light of Mr. Justice Jackson's remark in his concurring opinion in Krulewitch v. US (1949) 336 US 440,453:

> ...The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. US, 332 US 539, 559, all practicing lawyers know to be unmitigated fiction...

Petitioner respectfully submits that the position taken by the First Circuit regarding this species of argument, as set forth in US v. Flannery (1st Cir 1971) 451 F2d 880, 881-882, is the correct one, and that, inasmuch as the decision below in the instant case is irreconcilable with Flannery, for the reason set forth supra, as well as in the petition for writ of certiorari, this

Honorable Court should issue a writ of certiorari to the court below.

WHEREFORE, petitioner Julius Wilkerson respectfully prays that this Honorable Court grant unto him all relief prayed for in his petition for writ of certiorari, and for any and all such other relief as the cause and the interests of Justice may permit.

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CERTIFICATE OF SERVICE

I, the undersigned Michael F. Barry, Esq., attorney for Julius Wilkerson, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 11th day of July, 1975, I served copies of the foregoing Reply Memorandum for Petitioner Julius Wilkerson, including Appendix "A", thereof, on the United States of America, respondent herein, by leaving three (3) copies thereof at the office of Hon. Mary Williams Cazalas, Assistant U.S. Attorney, 500 St. Louis Street, New Orleans, La. 70130, and by mailing three (3) copies in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, pursuant to Rule 33.2(a) of the

Rules of the Supreme Court of the United States.

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APPENDIX "A"

Petitioner here reproduces the pertinent and relevant portions of Rule 41 of the Federal Rules of Criminal Procedure; as amended:

...

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

...